Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
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No. 88-1619 (2)

IN THE

Supreme Court Of The United States

October Term, 1988

ALABAMA DEPARTMENT OF EDUCATION, DEPARTMENT OF DISABILITY DETERMINATION SERVICE, THE PERSONNEL BOARD OF THE STATE OF ALABAMA,

Petitioners

v.

LARRY L. POWERS, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case does not present issues which are before the Supreme Court in *Wards Cove Packing, Inc. v. Atonio,* 827 F.2d 439 (9th Cir. 1987), *cert. granted,* 108 S.Ct. 2896 (June 30, 1988), and this Court's decision in *Wards Cove Packing* will not be dispositive of the present case. Moreover, the Court of Appeals' decision is harmonious with the Supreme Court decisions in *Watson v. Fort Worth Bank and Trust,* ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) and *Price Waterhouse v. Hopkins,* ___ U.S. ___, 57 U.S.L.W. 4469 (May 1, 1989).

Accordingly this case is not controlled either by *Watson* or the issues presented in *Wards Cove Packing.* No new issues have been raised and there is no conflict with prior Supreme Court case law. The issues presented on appeal and addressed in the Petition for Certiorari in this case are:

1. Whether practices identified by plaintiffs and defendants pursuant to proof and rebuttal of impact claims were subject to the impact analysis and burdens of proof established by *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 188 (1971) and its prodgeny.

2. Whether in a disaparate impact case when the evidence has established a direct correlation between the procedures used and racial impact, the defendant employer carries the burden of establishing business necessity of the objective practices identified by the parties.

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STATEMENT OF THE CASE

Suit was filed by the plaintiffs-respondents on June 25, 1982 alleging classwide and individual race discrimination in employment opportunities in violation of Title VII and 42 U.S.C. Section 1981. The trial court entered an Order certifying a class of black employees denied promotions "from 1977 until the present". After trial on the merits before District Judge J. Foy Guin, the district court ruled that the defendants had not discriminated on the basis of race. In so doing the district court failed to address many of the issues presented in the case. On appeal to the Eleventh Circuit court of appeals, the district court's judgment as to inten-

tional discrimination was affirmed, but the appellate court reversed and remanded the case for further proceedings on the disparate impact claims. The defendant-petitioners thereafter pursued this petition for certiorari.

At the beginning of the period covered by the class allegations the defendant had a stark pattern of racial segregation in its work force. As of January 1, 1977, in a state that was 25% black, the defendant Department of Disability Services (DDS) had a work force that was 13% black, and had only one black person above the entry level positions.[1] Moreover, the historical pattern of race discrimination in employment opportunities by the State of Alabama and its various departments, including the defendants herein, was a matter of official record in *United States v. Frazer,* 317 F. Supp. 1079, 1086-1090 (M.D. Ala. 1970), and *NAACP v. Allen,* 340 F. Supp. 703 (M.D. Ala. 1972).

The pattern of racial stratification which existed at DDS on January 1, 1977 was perpetuated through a variety of discriminatory devices in the years that followed. By January 1, 1978 these patterns had changed very little if at all. There were still no black supervisors and of 14 employees holding Examiner III positions only one was black. Of 29 Examiner II positions there were only 3 blacks. As of January 1, 1979, blacks continued to hold the lowest level jobs and whites continued to hold the upper level jobs despite numerous promotional opportunities and vacancies in the upper level positions which the black employees were qualified to fill. Of the total of 30 promotions in 1978, only two were awarded to black employees: all of the supervisory positions were awarded to whites and of the 19 promotions to Examiner II, only one was black.

By the end of 1981, five years later, there was still not a single black employee who had ever been a supervisor, there

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[1]For blacks, entry level positions were Examiner Assistant, Examiner I and Clerical jobs. Entry level jobs for whites included these positions plus the positions of Examiner II, Examiner III, Supervisor I, Accountant I, Director and Assistant Director. Moreover, only three blacks had been hired at the level of Examiner I, the majority being initially employed at the lower ranking Examiner Assistant and clerical positions.

was only one black who had ever been an Examiner III, and there were only four blacks who reached Examiner II status. Of the five who had advanced beyond the entry level, four had filed EEOC charges prior to receiving their promotions. For the ten year period from the beginning of 1977 to the end of 1986 blacks comprised at least 26.8% of the work force, but received only 18.3% of the promotions above the entry level Examiner I position, most of which promotions for blacks were to the Examiner II level.

After trial on the merits, the district court found as a fact that with the exception of the entry level Examiner I position, positions were filled through internal promotions from within the DDS "line of progression", and that the positions must be worked in sequential order before eligibility for promotion to the next higher level. Although the promotion process included required minimum experience levels to qualify for certification for promotion, these service requirements were not strictly applied to whites who were hired at higher than entry level positions.[2] By contrast, black employees have uniformly been required to move sequentially through the historically white mid-level positions in lock-step fashion regardless of their individual qualifications.

At trial Plaintiffs introduced evidence that a subjective factor in the process, supervisory evaluations, impacted on black promotional opportunities. The defendants did not deny that black evaluations were consistently lower than white evaluations, but challenged the statistical significance of the effect these lower evaluations had on the selection process and proposed statistical evidence asserting that the stratification and pattern of promotions could be explained by other factors. Chief among the defendants criticisms of

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[2]Plaintiffs introduced evidence establishing that at least seven white employees were hired directly into the Examiner II position without prior service in the Examiner I position or any other entry level job, and that at least ten white employees were hired into Examiner III positions without prior experience as Examiner II or Examiner I. Two white employees were also hired into Supervisor I and Accountant I positions without any prior experience in the lower level jobs. There is no explanation in the record for these exceptions to the "line of progression" identified by the district court.

the plaintiffs' statistical proof was that the plaintiffs' expert had failed to account for length of service, certification of eligibility and job level in identifying the pool of eligible employees and projecting the expected representation of blacks among those promoted.[3] In support of this contention, defendants' expert prepared an exhibit and testified that job level and length of service were directly correlated.

With respect to the explanatory factors identified by the defendants, the court of appeals found that although they might have sufficed absent a history of prior discrimination, that it was entirely possible, if in fact not likely, that racial discrimination itself was responsible for the difference in whites' and blacks' length of service. Rather than rebutting the plaintiffs' claims, the defendants' proposed explanation bolstered the idea that the process, or at least certain requirements utilized in the process, perpetuated past discrimination in violation of Title VII.

The district court did not address the discriminatory impact of the entry level, job residency, and service preference factors in the defendants' promotional process, but held, sua sponte, that the system was a bona fide seniority system subject to exclusion under section 703(h) of Title VII. The defendants, however, did not raise this defense either in the pleading or in the pretrial position and in fact had

[3]Defendants required black employees to serve one year in each level before being eligible for promotion to the next higher level. In conjunction with this practice, the defendants employed a certification process which would be activated only on the request of the department. Employees could not apply for a position until an announcement was posted that a new register of eligible applicants was being made. Defendants were not required to and would not request a new register for each vacancy with the result that blacks who met the job experience requirements were not considered for promotion. For example, in a five year period between 1982 and the end of 1986, the defendant used the same list or certificate of eligible employees for selections to fill vacancies for Supervisor I positions. By not calling for a new certification for each vacancy, the DDS prevented the consideration of all employees who met the one year service requirement in the next lower position of Examiner III. At trial the defendants proposed to limit the pool of eligible applicants for each vacancy to those employees in the "feeder" positions (the next lower job classification in the progression) who were on the list, called a Certificate of Eligibles.

specifically disavowed any reliance on section 703(h) when the plaintiffs sought to clarify the defendants' position at trial.[4] The court of appeals held that the defendants had waived the section 703(h) defense and that the district court was in error for its failure to recognize this fact.

The court of appeals remanded the case to the district court for further proceedings, stating that although in most instances the failure of the defendant to respond to proof of discriminatory impact with a showing of business necessity would warrant a judgment for the plaintiffs, that it was clear that all parties were laboring under misconceptions as to how the case would proceed and that all parties should have an opportunity to respond directly to the appellate court's holdings with further proofs.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT ISSUES IDENTICAL TO THOSE PENDING BEFORE THE SUPREME COURT.

The outcome of this case will not be governed by the Supreme Court's decision in *Wards Cove Packing, Inc. v. Antonio,* 827 F.2d 439 (9th Cir. 1987), *cert. granted,* 108 S.Ct. 2896 (June 30, 1988), or by the Court's decision in *Watson v. Fort Worth Bank and Trust,* ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988), because neither case is dispositive of the issues raised on appeal in this case. Although the petitioner states that an issue common to both this case and *Ward's Cove, supra,* is whether the plaintiff in a disparate impact case under Title VII of the Civil Rights Act of 1964 has the burden of identifying at the outset the employment

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[4]Seniority alone cannot explain the racial imbalance in the work force. The undisputed evidence at trial established that many blacks were bypassed by less senior whites. There were at least 42 occasions when less senior whites were promoted ahead of Carl Knight, a black. There were at least 21 occasions when less senior whites were promoted ahead of Larry Powers, a black. There were 118 occasions when less senior whites were promoted ahead of Charles Holt, a black. There were at least 58 times when less senior whites were promoted ahead of Lovie Marable, a black. There were 38 times that this occurred to Janice Bell and Sheila Bledsoe.

practices which have allegedly resulted in disparate impact, this case does not raise that issue.

A. *Plaintiffs and Defendants Identified the Discriminatory Practice at the Outset*

In the current case, the plaintiff at the outset identified the employment practices alleged to be causing racial disparities in employment opportunities, and the defendant responded with proof that it was not the practices challenged by plaintiffs which caused such disparities but was instead certain other practices; specifically seniority and sequential movement through a line of progression were proffered by defendant as explanations for the statistical disparities shown to exist.[5] The plaintiff responded by contending that these alternative practices also had disparate impact because, under the defendant's own proof, they were what caused the observed racial disparities in employment opportunities.

Thus, it was the defendant itself, in combination with the plaintiffs, who identified the practices causing disparate impact on black employees. There is nothing in *Watson, supra,* or logic which indicates that this is not a proper way to proceed in a disparate impact case. It would serve no purpose whatsoever in the enforcement of the Civil Rights Act to allow a defendant to defeat a showing of disparate

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[5] At the trial of this case, the defendant proposed an alternative statistical model to rebut plaintiff's prima facie statistical proof, and in so doing established that the disparate pattern of selections resulted not from the subjective factors specifically challenged by the plaintiffs, but rather from an objective factor:

> For in addition to challenging the statistical significance of the plaintiffs' statistics, and instead of simply proving why the subjective evaluations were necessary, the defendants chose to argue that any disparate impact of the promotions process resulted not from the evaluations but from the disparity in blacks' and whites' length of service, the primary factor in arriving at the 45% 'experience' score . . . Thus, even if the additional practices were not originally in the case, they became subject to the plaintiffs' challenge when the defendants relied on them to rebut the allegations concerning the evaluations.

Opinion below at 854 F.2d 1285, 1293-1294.

impact merely by presenting evidence of alternative criteria causing that impact. For the defendant to merely show that the racial disparities are caused by one criterion rather than another does not dispel the fact that the racial disparities exist or justify a Court's refusal to remedy such disparities. When a defendant responds to proof of racial disparities by presenting proof that such disparities are caused by a criterion other than the one initially attacked by the plaintiff, the plaintiff should then have the right to contend that the alternative criterion also violates the Act because it causes racial disparities by the defendant's own admission and proof.

There is nothing unfair or inequitable about such a result. A defendant which cannot dispute that racial disparities exist, but can only quibble about which of its employment practices causes such disparities, cannot legitimately complain about being required to demonstrate that the alternative practices it articulates as the cause of the discriminatory result are job related or a business necessity, especially where, as here, the discriminatory practice is a discrete objective criterion such as seniority and sequential movement in a line of progression. If this is not the case, then plaintiff's proof of racial disparities in employment opportunities is never really met by any defense responsive to the concerns of Congress in enacting Title VII. Congress wanted to eradicate employment practices which operate as "built — in — headwinds" to the advancement of black employees unless such practices are a business necessity. Thus, defendants have traditionally been allowed to defend by showing either that there are no real statistical disparities or by demonstrating that the practices causing such disparities are necessary to the operation of the business.[6] Both of these lines of defense

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[6]Practices relied on by the defendants to explain the actions taken and the disparate results must have a manifest relationship to the positions sought and must not perpetuate the effects of prior discrimination. *Griggs v. Duke Power Company, infra; Dothard v. Rawlinson, infra; Connecticut v. Teal, infra.* Just as a defendant in a disparate treatment case cannot articulate a discriminatory reason for its actions to rebut a prima facie case of discrimination (e.g., stating that the reason for a challenged decision was

are responsive to the concerns of Title VII, but a defense which merely articulates alternative causes of the racial disparities with no effort to dispel the existence of the disparity or to show that it is necessary is a *non sequitur* in relation to the statutory purposes of achieving equal employment opportunities.

B. *Burdens of Proof*

In a disparate treatment case the plaintiff is not required to prove the ultimate issue of intentional discrimination *vel non* as a part of his prima facie case but instead is only required to prove circumstantial factors which provide an inference of discrimination if unexplained. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Unlike the circumstantial proof in a disparate treatment case, to meet the plaintiffs' *prima facie* burden in a disparate impact case, the plaintiff must conclusively prove the racial correlation between the process challenged and the discriminatory impact (with the defendant doing all it can to rebut such proof by attacking the plaintiffs' statistical standards and assumptions) *before* the burden shifts to the defendant. Thus, the disparate impact order and allocation of proof mirrors that imposed in disparate treatment cases when the ultimate fact of discriminatory intent is proven by the plaintiffs. Then, and only then, the burden of proof shifts to the defendant on the job relatedness or business necessity defense which operates as a type of affirmative defense to the proof of discriminatory impact (i.e., it does not rebut the proof of impact but provides an alterna-

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sex where racial discrimination was alleged), a defendant who chooses to defend an impact case by challenging the plaintiffs' statistical model through the identification of an alternative explanatory factor must also establish the business necessity of the explanatory factor or the defense must fail. See e.g., *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (on remand 577 F.2d 98, appeal after remand 652 F.2d 904, *vacated* 103 S.Ct. 2420). Moreover, the use of seniority as a selection criteria for promotions under these circumstances has been held to have disparate impact in violation of Title VII unless it is protected by section 703(h) of the Act, and the defendant-petitioners waived this claim.

tive method of avoiding liability in the nature of an affirmative defense). This is perfectly consistent with this Court's recent decision in *Price Waterhouse v. Hopkins,* 57 U.S.L.W. 4469, 4475 (May 1, 1989), where this Court held that once the ultimate issue of discrimination is proven, then it is permissible to shift a burden of proof to the defendant on issues which do not directly address the ultimate issue of race discrimination but instead operate as an avoidance of that fact and liability.

The identification of a racial disparity and the articulation of a justification for the cause of the disparity mirror the *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) disparate treatment model of a prima facie case and articulation of a legitimate nondiscriminatory reason. The difference between impact and treatment analysis begins at this point. In the treatment model the burden of proving the ultimate fact, discriminatory intent, remains with the plaintiff. In the impact model, however, the ultimate fact, disparate impact is proven with plaintiff's prima facie case, and the burden shifts to the defendant to establish the business justification for the discriminatory factor. See, *Price Waterhouse v. Hopkins,* ___ U.S. ___, 57 U.S.L.W. 4469, 4475 (May 1, 1989).

It is also important to recall that the impact model had its genesis in the statutory allocation of the burdens of proof requiring employers who utilized qualifications which were facially discriminatory to establish that such discriminatory qualifications were job related or a business necessity. See, 42 U.S.C. Sections 2000e-2 (a) and (h); *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 188 (1971); *Albemarle Paper Company v. Moody,* 422 U.S. 405, 95 S.C.t. 2362, 45 L.Ed.2d 280 (1975); *Connecticut v. Teal,* 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982); *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Unlike the case where the factors are facially discriminatory, however, where facially neutral factors are challenged, the defendant may defend its case by challenging the plaintiff's statistical proof of disparate impact. This can be done by challenging the standard utilized by the plaintiff, see e.g., *Hazelwood*

School District v. U.S., 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 3009, 92 L.Ed.2d 315 (1986); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856-57 n.20 and n.23, 52 L.Ed.2d 396, appeal after remand *U.S. Equal Employment Opportunity Commission v. T.I.M.E.D.C., Inc.*, 659 F.2d 690 (1977); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-621, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974), or by establishing that a justifiable or nondiscriminatory factor explains the apparent disparate results. See e.g., *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2051, 48 L.Ed.2d 597 (1976); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 585, 99 S.Ct. 1355, 1365, 59 L.Ed.2d 587 (1979); *Bazemore v. Friday, supra; Teamsters, supra.*

The issues addressed by the Court in *Ward's Cove* do not include the allocation of the burden of proof of business necessity after identification of an alternative explanatory factor, see *Price Waterhouse, supra*, but rather address the factors to be considered in identifying the relevant applicant pool on which the statistical evidence should be based. The issues raised in *Ward's Cove* have been addressed by the Court in earlier cases and the Court has identified at least three possible pools: (1) actual applicants, usually called an applicant flow analysis, see e.g., *Beazer, supra; Hazelwood, supra; Teamsters, supra;* (2) actual and potential applicants, ordinarily used where the application process has been tainted by factors which limited access or success in completing the application process making the pool of actual applicants an unreliable basis for statistical analysis since it would reflect the discrimination itself and where special knowledge, skills or abilities are necessary to performance of the jobs sought, see e.g., *Teamsters, supra; Mayor v. Educational Equality League, supra; Hazelwood, supra;* (3) the general population from which the employer would normally drawn its work force, a model ordinarily reserved to analysis of selections for unskilled jobs or jobs for which skills are obtained through on the job training, see e.g., *Dothard v. Rawlinson, supra; Teamsters, supra; Hazelwood, supra.*

In reviewing this case, the appellate court correctly held that the pool must be drawn as narrowly as possible to be considered probative of impact. In reversing the district court, however, the appellate court did not address the issue of the appropriate "pool" on which the statistical analysis should be based since the defendant-petitioners' own statistics and expert testimony established that the disparate pattern of selections was the result of an identified objective factor. The appropriate pool is therefore not at issue. Moreover, the pool selected was the appropriate pool (the work force as a whole) since the objective factors "identified" by the defendant to rebut the plaintiffs' statistics restricted applications and perpetuated prior discriminatory practices. Neither the pool of actual applicants nor the general population of the state of Alabama was more appropriate since the former was tainted by the process itself and the latter would include individuals who did not possess the skills, knowledge, or abilities required to perform the duties of the positions.[7]

The other issues raised in *Ward's Cove*, the use of nepotism and separate recruiting practices for hiring skilled and unskilled workers are not raised in this case, and present special problems which do not arise in a "merit" promotion system. *Ward's Cove* does not address the issue whether an explanatory factor proposed by the defendant to explain disparate promotional results is a legitimate defense to a disparate impact case where the defendant has not indicated that the proposed factor has a manifest relationship to the positions in question. Nor does *Ward's Cove* raise the issue of the burden of proof as to business necessity, but rather addresses the issue of appropriate statistical standards as discussed above.

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[7]It is important to note that while the minimum qualifications for entry level employment are not at issue, the typical Examiner I could fulfill the requirements of a typical Examiner III. Evidence at trial established that there was not a lot of training going on and that everyone in the department ws conversant with what went on in the department. Opinion below at 1297.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE PLURALITY DECISION OF THIS COURT IN *WATSON*

The dispositive issue in *Watson, surpa,* was whether subjective processes as distinguished from objective factors could be analyzed under a disparate impact model. Neither the district court nor the appellate court in *Watson* entered any findings regarding plaintiff's prima facie statistical case since the lower courts, relying on binding circuit precedent, had refused to apply the disparate impact model to the challenged subjective processes. Although the plurality opinion discussed issues related to the proof model to be applied to disparate impact analysis of subjective proceses, the discussion was not based on specific factual determinations and therefore was merely an abstract discussion intended to provide some guidance as to the opinions of the four jsutices who concurred in the plurality opinion, and in which they indicated that the analysis of subjective processes should be differentiated from the analysis of objective processes.[8] See, *Price Waterhouse, supra.*

The petitioners assert that the appellate court ignored language in *Watson* indicating that plaintiffs must identify

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[8]*Watson, supra,* at 2787. The plurality opinion makes it clear in II-c that a distinction should be made between objective criteria which can be readily justified as "business necessities" through validation studies designed to address "discrete selection criteria", and "subjective selection criteria" which cannot be measured accurately through standardized testing techniques. Justice O'Connor wrote, in an opinion joined by Chief Justice Rehnquist, Justice White and Justice Scalia, that "Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted . . . Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized. Our previous decisions offer guidance, but today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds."

the particular aspect of the process being challenged, and that the respondents were permitted to present additional contentions on appeal which *they* had not raised at trial and which were not addressed by the district court's opinion. In fact these issues were raised at trial pursuant to the respondents' defense that alternative factors explained the disparate impact. On appeal the plaintiffs challenged the district court's failure to address the legitimacy of the factors not only identified by the defendants, but proven by the defendants to be directly correlated to the race of the employees. Although the process challenged in this case had both objective and subjective elements, the factor identified by the defendants as causing a discriminatory impact was an objective factor: length of service.

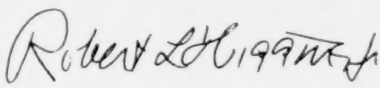
The petitioners also assert that the Court reserved issues in *Watson* for later consideration. However, the plurality decision in *Watson* did not change law or reserve issues for later resolution but rather asserted that *existing* law provided sufficient guidelines which could be applied to impact analysis of subjective proceses. See also, *Price Waterhouse, supra.* This case is therefore distinguishable from *American Textile Manufacturers Institute v. Donovan,* 452 U.S. 490, 495 (1981) and *United States v. Martinez-Fuerte,* 428 U.S. 543, 545 (1976). Even the petitioners agree that the burdens of proof under the impact theory as applied to objective processes have been repeatedly addressed by this Court since the theory was first recognized in *Griggs,* that *Albemarle Paper Co. v. Moody* clearly established the shifting burden of proof in impact cases in 1975, and that the Court of Appeals followed the established law. Moreover, the language cited by petitioners from *Watson* refer to proof of impact as the ultimate burden, not proof of business necessity: "the ultimate burden of proving *that discrimination against a protected group has been caused by a specific employment practice* remains with the plaintiff at all times." Finally, in *Price Waterhouse, supra,* this Court has made it absolutely clear that "it is the employer's burden to justify decisions resulting from [use of an illegitimate criterion to distinguish among employees]." *Id.* at 4475. *Watson* is not

dispositive of the issues raised on appeal in this case and provides no new principles to be applied to this case.

CONCLUSION

This case does not address any issues reserved by the Court for later consideration or of first impression on which there is disagreement between the circuits requiring a decision by the Court nor is it controlled by the issues raised in either *Ward's Cove* or *Watson*. The petition for certiorari is due to be denied.

Respectfully submitted,



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